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by
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For at least a generation, and possibly much longer, philosophers have been debating whether all values are commensurable. On one side of the debate is a tradition, with roots as far back as Jeremy Bentham, associated most directly with modern utilitarianism. This tradition holds that all values are commensurable, that there is—at least in theory—a way of comparing any value with any other, and a way of reducing all values to a single metric. On the opposite side of the debate is an account, associated both with nonconsequentialism and with pluralist versions of consequentialism, maintaining that at least some values are irreducibly incommensurable—that they cannot, at bedrock, be measured against each other or converted into a common currency.

It should come as no surprise that the incommensurability question has a number of concrete constitutional and legal implications.[1] Although the constitutional import of one position or another in the debate about commensurability is itself contestable, it is at least plausible to conclude that certain legal methodologies—so-called "balancing" being the most obvious—presuppose something resembling broad-based commensurability, and that certain legal structures—such as judicial enforcement of rights even against the interests of the majority—are most at home within a framework that recognizes the irreducible incommensurability of values.

I have three aims in this Article, but none of them involves attempting to resolve the philosophical question whether values are or are not, as an ontological matter, commensurable. First, I want to

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1. Yet, as with many debates about moral theory, the commensurability debate also has fewer legal and constitutional implications than some people suppose.

sketch the various positions in the debate as I understand it, in the hope that this descriptive enterprise will help others to understand some of the existing terrain.[2] Second, I will venture some deliberately tentative thoughts about the constitutional implications of holding one position or another in the commensurability debate.[3] And third, turning to what I consider the core of the argument, I will offer a theoretical account of the legitimacy of trying to resolve the commensurability debate by reference to the consequences of holding one position or another.[4] Drawing on a tradition going back to John Stuart Mill's discussion of justice in *Utilitarianism*,[5] and represented by much of the more recent writing about utilitarian *dispositions*, I will argue consequentially, or at least instrumentally, that there is nothing disingenuous or otherwise morally suspect in selecting midlevel philosophical positions strategically on the basis of their expected consequences. Just as Mill argued that we should *choose* to inculcate and internalize a sense of justice because doing so would maximize utility,[6] I will argue that we might choose to internalize a view of commensurability or incommensurability based on an admittedly instrumental calculation of which position would better serve deeper noninstrumental values. Accepting this strategic or instrumental approach will not resolve the commensurability debate, either for philosophers or for lawyers, especially because any account of the instrumental desirability of certain midlevel principles or ideas will invariably be temporally and culturally contingent. Still, making the case for an instrumental approach to the commensurability debate may provide additional resources by which some of the legal debates about commensurability may be evaluated, and may at the same time show the philosophical and legal controversies to be more distinct from each other than has commonly been supposed.

I

The philosophical debate about commensurability takes place within the realm of practical philosophy, the domain in which we think about what to *do*, rather than within the realm of theoretical philosophy, the domain in which we think about what *is* or about what

2. *See* Part I *infra*.
3. *See* Parts II-III *infra*.
4. *See* Part IV *infra*.
5. John Stuart Mill, *Utilitarianism*, *in* ESSENTIAL WORKS OF JOHN STUART MILL 189 (Max Lerner ed., 1961) [hereinafter Mill, *Utilitarianism*].
6. *Id.* at 226-48.

to believe.[7] The distinction between the two realms is important here because no one does or could plausibly maintain that all theoretical values are commensurable. With all due respect to Justice Scalia, and also to the organizers of this Symposium, who have borrowed Justice Scalia's deceptively appealing but tendentious and misleading metaphor about the impossibility of comparing the length of a line with the heaviness of a rock,[8] no one contends that length and weight can be reduced to a single measure, any more than people contend that color and smell can be measured along a unitary metric. To suppose this would be absurd, which is perhaps why no one has supposed it, and which is why it is misleading to characterize the claim to commensurability in the terms chosen by Justice Scalia and by our otherwise gracious hosts.

When we enter the realm of practical reason, the argument for commensurability becomes much more plausible. Associated most closely with the tradition of utilitarianism, proponents of commensurability within that tradition maintain that agents always choose the most valuable among competing alternatives for action, that the most valuable action among the available alternatives is necessarily the one that will produce the greatest increase in utility, and that this assessment is, in theory, always possible, because *any* proposed course of action can be measured in terms of its effect on utility.[9] The argument for commensurability, if successful, thus concludes that all decisional options can, in theory, be reduced to a single value, and that decisional options can hence be evaluated by first comparing the expected value of each and then selecting the option with the greatest expected value.

7. The distinction is usefully described in Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1614-20 (1991).

8. Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). The Symposium brochure compounds the felony (well, maybe it's only a misdemeanor) by describing the attempts to weigh individual rights with public values as a "madness" that could only be believed in Wonderland. The existing state of play of the commensurability debate does not yet, as I will show, justify that level of dismissiveness of either side of the debate. Moreover, even the opponents of commensurability recognize that incommensurability does not entail noncomparability. Those who believe, for example, that the values of bodily integrity are incommensurable with money need not deny that it is rational to risk a minor bodily injury in order to gain a great deal of money.

9. *See, e.g.*, Joseph Raz & James Griffin, *Mixing Values, in* 65 THE ARISTOTELIAN SOCIETY 83, 101 (Supp. 1991); James Griffin, *Are There Incommensurable Values?*, 7 PHIL. & PUB. AFF. 39 (1977) (arguing that values are commensurable); Donald H. Regan, *Authority and Value: Reflections on Raz's* Morality of Freedom, 62 S. CAL. L. REV. 995, 1056-75 (1989).

Even assuming that utility, in some form or another,[10] is the common single value by which decisional options can be measured, it is important to note that nothing in the argument for commensurability entails the conclusion that utility can be further reduced to money or, conversely, that money is the best measure of utility. It is perhaps not surprising that some people think that a commitment to commensurability (or even to utilitarianism generally) presupposes or entails a commitment to monetarization or commodification.[11] Money is in fact a common measure for many things, and money is often used by the law as its vehicle for compensation for harms neither immediately nor naturally valued in monetary terms (*e.g.*, pain and suffering, mental anguish, injury to noncommercial reputation, loss of consortium, invasion of privacy, and deprivation of personal constitutional rights). Moreover, some economists (and others as well) subscribe both to utilitarianism and to the view that money is the best measure of utility. And finally, the debate about the use and misuse of cost-benefit (or risk-benefit) analysis is one in which the commensurability position is ordinarily manifested in dollar terms.[12] Yet the supposition that monetarization follows from commensurability is still a non sequitur. One could believe, for example, that utility was a matter of

10. A good overview of the varieties of utilitarianism is in Dan W. Brock, *Recent Work in Utilitarianism*, 10 AM. PHIL. Q. 241 (1973).

11. "Entails" is perhaps slightly too strong, but arguments against commensurability often move quite quickly from acknowledging the lack of a necessary connection between commensurability and commodification (which I take to be the treatment of something as a thing that can be bought and sold for money) to arguments largely against the use of money as the currency of commensurability. A good example is Cass Sunstein, *On Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

On commodification in general, see Scott Altman, *(Com)Modifying Experience*, 65 S. CAL. L. REV. 293 (1991); Elizabeth Anderson, *Is Women's Labor a Commodity*, 19 PHIL. & PUB. AFF. 71 (1990); Margaret Jane Radin, *Justice and the Market Domain, in* MARKETS AND JUSTICE: NOMOS XXXI 165 (John W. Chapman & J. Roland Pennock eds., 1989); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1986). Implicit in what I say here is that one can recognize the contingent advantages of commensurability without committing to commodification, although it may be another implication of my argument that commodification can also be thought of as morally desirable at some times and in some places.

12. *See, e.g.*, BARUCH FISCHHOFF ET AL., ACCEPTABLE RISK (1981); EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS (1978); Alan Gewirth, *Human Rights and the Prevention of Cancer*, 17 AM. PHIL. Q. 117, 122-23 (1980); Harold P. Green, *The Risk-Benefit Calculus in Safety Determinations*, 43 GEO. WASH. L. REV. 791 (1975); Sheldon Samuels, *The Uncertainty Factor*, 363 ANNALS N.Y. ACAD. SCI. 269 (1981); Frederick Schauer, *Legal Process and the Identification of Human Values*, 9 AM. J. INDUST. MED. 75 (1986); Laurence Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 90-91 (1972).

preference-satisfaction or desire-satisfaction, or pleasure-seeking, or even some less personal (less subjective) measure of well-being, while still believing that money was not necessarily the only or the best or even a good measure of, say, pleasure. While money brings pleasure to many people, and while money allows people to buy many things that will increase their pleasure, a pleasure-oriented utilitarian could, consistent with her utilitarianism, still believe that there are pleasures that money cannot buy. It is of course true that there are better developed social mechanisms for measuring money across persons than there are mechanisms for measuring pleasure across persons. But for purposes of the philosophical debate about utilitarianism, these mechanisms are somewhat beside the point. There are good reasons to resist measuring all value in dollars, but the argument that dollars are not the irreducible measure of value no more proves that there is *no* irreducible measure of value than the argument that money cannot buy love proves that there is no such thing as love.

With the money issue aside for now, it becomes clear, in the absence of existing mechanisms for the inter-personal measurement of things like happiness or pleasure,[13] that the commensurability debate within the philosophical community is not one that has as many direct real-world applications as might first be supposed. Still, noting the basic positions in the debate will be useful for what follows. Thus, it is worthwhile to compare the basic commensurability position with two different types of anticommensurability arguments, one (like utilitarianism) a variety of consequentialism, and the other decidedly anticonsequentialist. The consequentialist anticommensurability position is based on the possibility of a multivalued consequentialism. It is true that univalued (or monistic) forms of consequentialism are the most common forms of consequentialism, and that utilitarianism is the most common form of univalued consequentialism. There are, however, versions of consequentialism that recognize a plurality of ultimate or irreducible values while still believing that practical reasoning involves the task of assessing which course of action will produce the best consequences, as measured in terms of multiple irreducible values.[14] This

13. *See generally* INTERPERSONAL COMPARISONS OF WELL-BEING (Jon Elster & John E. Roemer eds., 1991); JON ELSTER & AANUND HYLLAND, FOUNDATIONS OF SOCIAL CHOICE THEORY (1986).

14. The best example of a consequentialist position with multiple primary goods is GEORGE EDWARD MOORE, PRINCIPIA ETHICA (1903). More recently, the same structure is endorsed in much of the work of Amartya Sen. *See, e.g.*, AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); AMARTYA SEN & BERNARD WILLIAMS, *Introduction*, *in* UTILITARIANISM AND BEYOND 1, 16-20 (Amartya Sen & Bernard Williams eds.,

pluralist, or multivalued, variety of consequentialism might of course have difficulty providing a procedure for decision making once the irreducible values come into conflict with each other. Yet, the existence of such possibly irreconcilable quandaries does not by itself undermine the consequentialism of a consequentialist position that maintains both that there is a plurality of incommensurable values, and that, absent conflicts among those values, the task of deciding what to do is always one to be performed solely in light of the consequences of the various proposed actions.[15]

Although multivalued consequentialism is a plausible foundation for a belief in incommensurability, more commonly we see a close affinity between a belief in incommensurability and a rejection of consequentialism. Those who believe, for example, that certain activities (such as torturing, killing, lying, or betraying a friend) are simply wrong regardless of their consequences are likely to believe that the wrongness of, say, torturing is not measured in the same terms as the increase in welfare that might be brought from some act of torture. Thus the wrong of torture can be taken as a trump or side constraint on welfare maximization in all possible cases.[16]

The existence (or not) of incommensurable values can thus be either the product or the proof of the truth (or not) of anticonsequentialism. That is, those who believe initially in the truth of anticonsequentialism may see the incommensurability of values as one consequence or product of their anticonsequentialism. And those who believe initially in the truth of the claim of incommensurability may take *that* belief as itself as strong grounds for rejecting consequentialism. The methodology of moral theory is pivotal here. If we are reasoning from the "top down," one starts with anticonsequentialism as moral theory, and reasons from that relatively abstract position

1982). See also the discussion of pluralism in SUSAN L. HURLEY, NATURAL REASONS: PERSONALTY AND POLITY 193-96 (1989).

15. I understand Joseph Raz's current project to include the task of trying to work out how a pluralist consequentialist might deal nonarbitrarily and rationally with conflicts among primary and incommensurable values. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 339-40 (1986); Raz & Griffin, *supra* note 9, at 83; Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1220-22 (1989).

16. On this picture of deontological limitations on consequentialist maximization, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (1990); BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 98-107 (1972). On incommensurability from a nonconsequentialist perspective, see Thomas Nagel, *The Fragmentation of Value, in* MORTAL QUESTIONS 128 (1979); Bernard Williams, *Conflicts of Values, in* MORAL LUCK 71 (1981).

to a belief in the incommensurability of particular values. If instead one reasons from the "bottom up," one's belief in the primary or intuitive truth of certain ground-level incommensurabilities will be used to generate an anticonsequentialist moral framework. And if following the Rawlsian method of reflective equilibrium one does both,[17] then incommensurability remains a central question in working out both large moral theories and more particular visions of what to do in individual cases.

II

Although it should thus be clear that there is a close relationship between debates about commensurability and many of the enduring questions of moral philosophy, I do not want to try to resolve the commensurability debate here, nor do I want to try to resolve the even larger debates of which the commensurability debate is but a part. Rather, having first sketched the debate, I will proceed to suggest some of that debate's possible legal and constitutional consequences. My central agenda, however, will be to show why the latter might be more relevant to resolve the debate than commonly supposed—why it is appropriate to try to resolve the commensurability debate by recourse to the consequences of holding one position or another within it.

A useful starting point, especially in considering the focus of this Symposium, is the question of balancing in constitutional law. In considering the question of constitutional balancing, however, it will be useful to delineate four distinguishable processes, all frequently referred to as "balancing"[18] but nevertheless interestingly different from each other. The first, perhaps the dominant vision, is the one in which there seems to be a clash between nonconsequentialist rights and nonrights-based interests. The rights I speak of here are the kinds of rights that a nonconsequentialist would consider to be nonconsequen-

17. JOHN RAWLS, A THEORY OF JUSTICE 48-51 (1971).

18. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). The word "balancing" strikes me as misleading, because it suggests some sort of antecedent equipoise between the values weighed against each other, or at least a lack of weighing as we go about the process. Yet once we recognize that there is a difference between nonweighted consideration of primary values and weighted (prima facie, presumptive, etc.) consideration of the same values, we see that the word "balancing" may be too simple. Those who, for example, describe "balancing" as a process in which First Amendment rights can be overridden by a "clear and present danger," are either taking a (controversial) position about the lack of any actual decisional difference between a clear and present danger standard and some lower level of scrutiny, or are conflating through use of a single word what are in fact quite divergent decision procedures.

tialist[19]—Eighth Amendment rights to be free from cruel and unusual punishment, First Amendment rights to the free exercise of religion and perhaps to some dimensions of the freedom of speech, Fourth Amendment rights of privacy, Fifth Amendment rights to be free from compulsory self-incrimination, Fourteenth Amendment equality rights, and Fifth and Fourteenth amendment substantive due process privacy and autonomy rights. And the interests commonly counterpoised to these rights involve an aggregation of what some would call public values, others would call utility, others would call the general welfare, and still others would call the public, state or national interest. Regardless of the label, however, this debate replicates in constitutional clothing the classic philosophical debate between consequentialism and deontological rights.[20] The structure of the philosophical question about whether to torture one person in order to save the lives of many is, in important ways, the same as the structure of a constitutional debate about whether to permit discrimination on the basis of race in order to promote a non-rights-based public interest.[21] When applied to such constitutional issues, the metaphor of balancing is commonly used to mark two sides of the debate. From one side the proponents of balancing are accused of failing to recognize the essentially nonbalanceable (and so incommensurable) nature of the individual rights claim.[22] From the other side, opponents of balancing are accused of failing to recognize that rights-based or deontological constraints need not be absolute in order to have genuine decisional import.[23] In terms of this debate, therefore, it would be

19. I put it this way to emphasize the oft-neglected point that nonconsequentialism or anticonsequentialism are not comprehensive positions, in the sense of claiming that all decisions can be made without reference to consequences. The typical anticonsequentialist denies only that consequentialism can decide all cases, and thus logically accepts the possibility that consequentialism can decide some (or many) cases.

20. *See, e.g.*, J.J.C. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973).

21. One can recognize this structure in, for example, Korematsu v. United States, 323 U.S. 214 (1944), while still believing that the Court dramatically overestimated the threat to the public interest and dramatically undervalued the individual right. The same structure, but with better results, is seen in Palmore v. Sidoti, 466 U.S. 429 (1984), and in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

22. This was true in the classic free speech debates of a generation ago. *See* Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962).

23. This happens to be my own view. *See* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993); Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225, 227 (1981). For earlier, more extensive, and better elaborations of similar

plausible to suppose (although I will question this supposition later in this section) that a belief in incommensurability would produce less of a willingness to recognize the strength of non-rights-based interests when individual rights were at issue, because a commitment to incommensurability would involve at least a partial block on recognition of those interests. Conversely, a belief in commensurability would remove this block, and so it is thus plausible to suppose that such a belief would produce a lesser degree of protection of individual rights.

Although some constitutional rights are plausibly nonconsequentialist, not all are. Even those who believe that some constitutional rights are nonconsequentialist or morally primary can identify other rights as consequentialist. Consequentialist constitutional rights strategically create individual rights not because of the intrinsic importance of the rights, but because, in the long run, creating and enforcing those rights will be the best for the public interest. A good model is Ronald Dworkin's characterization of freedom of the press. For Dworkin this freedom is based not on the intrinsic importance of giving the press equal concern and respect, but rather on the institutional and utilitarian advantages of giving the press an enforceable immunity from a wide range of potential governmental restrictions.[24] Similarly, the Second Amendment right to keep and bear arms appears to be highly consequentialist, as does the Seventh Amendment's right to trial by jury in civil cases, and the Sixth Amendment rights to compulsory process and public trial. When these consequentialist constitutional rights conflict with nonconstitutionalized consequentialist "interests" like public safety or governmental efficiency, the process of deciding might be seen as arguably different from that involved when rights in the deontologically strong sense are on one side of the balance. Now the interests on *both* sides are consequentialist and thus, in theory, commensurable. Yet it could still be argued that the very purpose of constitutionalization of interests that are not, at bedrock, deontological rights is to compel public decisionmakers (including but not limited to judges), for strategic reasons of allocation of

positions, see Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977); Robert Nozick, *Moral Complications and Moral Structures*, 13 NAT. L. FORUM 1 (1968); Rolf Sartorius, *Utilitarianism, Rights, and Duties to Self*, 22 AM. PHIL. Q. 241 (1985).

24. RONALD DWORKIN, *The Farber Case: Reporters and Informers*, and *Is the Press Losing the First Amendment?*, *in* A MATTER OF PRINCIPLE 373, 381 (1985). Dworkin's views are particularly illustrative here because he so clearly distinguishes the nonconsequentialist (to him) right to free speech from the consequentialist right to freedom of the press.

power and distrust of excessively act-based decisionmaking, to treat certain interests as if they were strong rights, even though they are not. It may be, therefore, that one way of seeing the constitutional entrenchment of interests in the costume of rights is as a decision (resembling some varieties of rule-utilitarianism) at the constitution-making stage—to treat certain theoretically commensurable interests as incommensurable just because of a distrust of the actual process of commensurating on a case-by-case basis. This, once again, reflects the common (but possibly incorrect, as I shall suggest) view that treating rights and interests as incommensurable may in practice produce a greater protection of rights than would otherwise be the case.

Regardless of the deep source of the rights involved, however, both of these first two modes of balancing do counterpoise a right on one side against a nonright on the other. Thus we speak of balancing when courts are called upon to decide whether a state concern with crime control justifies restricting one's freedom to practice one's religion,[25] or whether a national concern with defense and national security justifies restricting the freedom of the press.[26] In a third type of situation in which the metaphor of balancing appears, however, there are individual rights on neither side, even though the issue may involve constitutional concerns. Instead, interests and only interests are on both sides of the balance. Separation of powers cases are prototypical here, for the nonexistence of any kind of individual right does not keep the courts from having to weigh consequentialist interests. For example, courts balance executive power against equally consequentialist interests in legislative prerogative,[27] or consequentialist interests in federal immunity from state taxation against consequentialist state interests in preserving their tax base.[28] It is true that Justice Scalia's concerns as expressed in *Bendix Autolite* question whether balancing that is underdetermined by formal law (regardless of what one considers to constitute formal law) should be done by the courts. But that issue is separate from the identification of a range of undoubtedly constitutional controversies in which the central concerns of the commensurability debate seem largely absent.

25. *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

26. *See, e.g.*, New York Times Co. v. United States (Pentagon Papers), 403 U.S. 713 (1971) (per curiam).

27. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

28. *See, e.g.*, Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989).

The existence of cases involving so-called "balancing" yet without strong individual rights on either side suggests the fourth type of balancing case—one in which strong rights directly conflict with each other. The classic free press/fair trial controversy is traditionally discussed in such terms,[29] and more recently, conflicts between free speech and racial or gender equality have frequently been couched in balancing rhetoric.[30] Here the commensurability debate is again relevant, for if equality values are not fungible with public safety values, then nor do they seem to be fungible with, say, the kinds of freedom of thought and freedom of conscience values that might undergird the free exercise and free speech clauses of the First Amendment. But unlike the case of rights opposed to nonrights interests, at first blush it does not appear as if anything would turn on the resolution of the commensurability controversy. Whether free exercise of religion or freedom of speech is or is not commensurable with equality will not eliminate the inevitability of making a decision when the two collide, and thus may not much influence a necessary process plausibly characterized as "balancing." Although rights versus rights cases may be the most morally problematic of constitutional cases, perhaps it is less in the rights versus rights cases than in the rights versus interests cases that the resolution of the commensurability controversy might actually make something of a difference.

III

Thus, the impact of a resolution of the commensurability debate on constitutional decisionmaking may not be the same in all types of decisions frequently referred to as "balancing," but will be greatest in central rights versus interests cases. But before accepting this conclusion in so simple a form, let us look more closely at the relationship of each of these varieties of balancing to the philosophical commensurability debate. Justice Scalia in *Bendix Autolite* appears to believe that courts are good only at measuring commensurables, for he takes the existence of incommensurable values as a sufficient condition for leav-

29. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF THE ELECTRONIC MASS MEDIA 542-57 (1986).

30. *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

ing a decision to legislative or majoritarian processes. More commonly, however, the argument runs in the opposite direction. If all values are commensurable, some would say, then there is little mandate for plucking some interests out of what is in fact a fungible subset and allocating the calibration and protection of those interests to a distinct institution, such as the courts.[31] But if values are incommensurable, and if we cannot determine how much of a loss of freedom of religion is worth how much of a gain in public safety, then it may be important to keep the decisionmaking as separate as we keep the values. Thus, although Ronald Dworkin has, in the context of debates about the soundness of the "right answer" thesis, expressed sympathy for large-scale commensurability,[32] his basic argument about judicial power is one that appears to flow out of the central *in*commensurability position. If, Dworkin argues, rights are side constraints or trumps on utilitarian calculations, and if there is a close affinity between utilitarianism and majoritarian democracy, then it is important to have

31. This is not the only possible conclusion that comes out of a commensurability premise, of course. It might be that certain values within the commensurable universe of values were particularly vulnerable to infringement, in which case it might appear advisable, despite commensurability, to erect special barriers (either by special forms of institutional protection, or by calling them "rights," or both) around some interests but not around others. Still, it seems safe to say that the case for special protection flows somewhat more easily out of an incommensurability premise than out of a commensurability one, because in the latter case the rights are seen as "naturally" rather than strategically superior.

32. Ronald Dworkin, *A Reply By Ronald Dworkin*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247 (Marshall Cohen ed., 1984); *see also* Ronald Dworkin, *On Gaps in the Law*, *in* CONTROVERSIES ABOUT LAW'S ONTOLOGY 84 (Paul Amselek & Neil MacCormick eds., 1991). The structure of this debate is worth noting. In response to Dworkin's marquee claim that there is a right answer to most legal controversies, *id.*, some critics have claimed that this requires an (unjustified) belief in the commensurability of values, for without commensurability there would be no right answer in those cases in which incommensurable values clashed. *See* John Finnis, NATURAL LAW AND NATURAL RIGHTS 116 (1980); John Finnis, *Concluding Reflections*, 38 CLEV. ST. L. REV. 231 (1990); John Finnis, *On Reason and Authority in* Law's Empire, 6 L. & PHIL. 357 (1987); John Mackie, *The Third Theory of Law*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra*, at 161. To this Dworkin has responded, *A Reply*, *supra*, at 271-75, that our ability to make comparisons may presuppose commensurability more than we think, for the making of comparisons is to impose a framework of commensurability on things that might, the need to compare aside, be conceptually incommensurate. Thus, even if we cannot say that a rock is more (or less) heavy than a line is long, we can say whether we would rather have one hundred pounds of gold or two strings of pearls. Thus it may be that all comparisons to Dworkin are teleological, necessarily involving a comparison for some purpose, and thus necessarily imposing a commensurating value on a possibly incommensurable world. *See also* SUSAN HURLEY, NATURAL REASONS (1989); Kenneth Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 335-36 (1989). An incisive overview and evaluation of this controversy is in BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 96-106 (1993).

institutions other than majoritarian ones decide whether and when majoritarian decisions will simply be trumped by strong, incommensurable, and deontologically derived rights.[33]

The Dworkinian picture, however, runs into some difficulty in dealing with nonconsequentialist but also nonabsolute rights. Even nonconsequentialist side constraints may be themselves overridden in some circumstances, not just by other and stronger rights, but by a sufficiently strongly arrayed collection of simple interests (or "public values"), such as the "compelling interest"[34] and "clear and present danger"[35] standards in American constitutional law. As a result, it then might be difficult to say, other than by recognizing the commensurability between rights and interests, just how it is that a large enough quantity of interests can override a right.[36] And perhaps it is just in the difficulty (although not, I believe, in the impossibility[37]) of making this case that we find the premise of the argument that a belief in incommensurability will in practice secure a stronger protection for individual rights than would a belief in commensurability.

Yet it is precisely at this point that we confront the central question of just how different views about commensurability affect somewhat more concrete constitutional decisionmaking. Implicit in most of the anticommensurability writing, it seems to me, is a fear of the risk, to put it into the free speech rhetoric of the 1950s and the 1960s, that rights might be "balanced away."[38] The opponents of commensurability seem to worry that recognizing the commensurability of rights and nonrights interests will produce a process through which rights

33. Ronald Dworkin, *Constitutional Cases, Justice and Rights*, and *Taking Rights Seriously*, *in* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 16, at 131, 150, 184.

34. Palmore v. Sidoti, 466 U.S. 429 (1984); Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967). Implicit in the point in the text is that the "compelling interest" standard is no longer "fatal in fact," Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972), but is a very high standard in fact overcome on occasion. *E.g.*, New York v. Ferber, 458 U.S. 747 (1982); Fullilove v. Klutznick, 448 U.S. 448, 495 (1980) (Powell, J., concurring). The point in the text of course applies as well to the heightened but somewhat less stringent standard applied in gender discrimination cases. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

35. Schenck v. United States, 249 U.S. 47 (1919).

36. *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993).

37. Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993).

38. *E.g.*, Laurent Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Konigsberg v. State Bar, 366 U.S. 36, 38 (1961) (Black, J., dissenting).

will be less often and less vigorously protected, just because they are seen as being of the same species as interests.

The fears of the anticommensurability proponents are hardly groundless. Although it is possible, both in theory and in practice, for balancing methodologies to be highly protective of individual rights against the claims of non-rights-based interests,[39] it is plausible to suppose that thinking of individual rights and public interests in roughly the same terms could produce less solicitude of individual rights than might otherwise be the case. First, claimants of individual rights, systematically with respect to some rights, might be somewhat unattractive right-bearers, as with many bearers of free speech and criminal procedure rights.[40] More significantly, however, the most salient feature of an individual rights claim under a balancing methodology presupposing commensurability will be the claim of one individual against the fundamentally similar (according to the commensurability presupposition) claims of many, with the consequent expected preference for the claims of the many against the claims of the one. Commensurability may not, it could be argued, provide sufficient resources to resist the attraction of seeing a multiperson public interest as superior to one individual's personal claim.[41]

There is, of course, no reason why this *must* be so. Even under a strict utilitarian calculation, a significant loss of utility by one person can plainly outweigh a slight loss of utility by many. A sophisticated consequentialist calculation will include within the consequences of an act the effect of that act on other acts and other decisions, such that the essentially empirical "slippery slope," "dangerous precedent," and

39. *See* Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

40. The premise of this claim is that a reasonably high percentage of claimants of Fourth, Fifth, and Sixth Amendment criminal procedure rights are in fact guilty of the crimes charged, and that a reasonably high percentage of claimants of First Amendment free speech rights are, like the Nazis in National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (per curiam), the Ku Klux Klan in Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), and the cross-burners in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), unpleasant people with unpleasant things to say. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

41. On these problems, see Derek Parfit, *Innumerate Ethics*, 7 PHIL. & PUB. AFF. 285 (1978) (applying utilitarian analysis to reach the ultimate conclusion that the course of action that benefits the largest number of people is the most desired), responding to John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977) (applying utilitarian analysis and concluding that the relative numbers of people who will be affected by various benefit distribution alternatives, as a factor in itself, should not play a significant role in choosing among them).

"weakness of the will" phenomena[42] will be taken into account by the ideal utilitarian calibrator. But in a world in which calibrators may be less than ideal, it is more plausible to suppose that a decisional framework in which individual rights and public interest claims are seen as members of the same species will incline more rather than less in the direction of underrecognition rather than overrecognition of the individual rights claims.

The concepts of underrecognition and overrecognition, however, presuppose some antecedent conception of the correct degree of recognition of some particular individual right, or of individual rights in general. I do not deny this, and thus my essentially empirical claim is that, given some antecedent conception of this ideal result or set of results, it is likely, but by no means inevitable, and by no means equally likely at all times and in all places, that fostering the view that rights and interests are commensurable will in practice produce underprotection of individual rights.

Yet it is important to recognize the possibility that a belief in commensurability may, at certain times, or in certain places, or with respect to certain decisions, produce a closer approximation to the ideal than would a rejection of commensurability. Most obviously, this would occur if at some time there were an extant overprotection rather than underprotection of some individual right. For example, if people thought of the right to keep and bear arms as a natural human right and a strong deontological side constraint on consequentialist calculations of the public interest, then promotion of the belief that keeping and bearing arms was designed to serve a value commensurable and tradable with the values of public safety in general might be a strategy well designed to reduce an extant over protection and thus produce a result more consonant with the stipulated ideal. Those who think that free speech rights in the United States have gone too far, and have been granted at the excess expense of other interests, might be well-advised to try to characterize free speech in consequentialist rather than deontological terms. This characterization would support the argument that getting a bit more of something else in exchange for a bit less free speech is not fundamentally different from the kinds of consequentialist calculations that dominate policymaking in general. More broadly, perhaps those who see an excessive protection of indi-

42. As well as other phenomena focusing on how the decision in this case will affect the decisions in other and future cases. *See* J.J.C. Smart, *Extreme and Restricted Utilitarianism*, 6 PHIL. Q. 344 (1956); Gregory W. Trianosky, *Rule-Utilitarianism and the Slippery Slope*, 75 J. PHIL. 414 (1978).

vidual rights generally, at the expense of community interests,[43] would be well-advised to stake their claim with commensurability, seemingly the best way to deflate what they see as an existing overuse of rights rhetoric and a consequent overprotection of rights and underprotection of interests.

Under other circumstances, or from different perspectives, promoting a belief in commensurability might increase the level of recognition of some right that is widely *under*valued. If particular classes of people are not considered people at all,[44] or are considered less than full persons, then treating every person as counting for one will increase the respect given to those who had hitherto counted as less than one.[45] Similarly, if some harms are currently undercompensated, then promoting a view pursuant to which all harms should be compensated with money might increase the recognition of some harms, even if promoting that view at the same time flattened the diversity among types of harms. The history of civil rights litigation under 42 U.S.C. section 1983, for example, might be to some a history of reprehensibly assuming that the harms of discrimination can be reduced to mere dollars. However, it might more plausibly be seen as a history of *increasing* recognition of theoretically (perhaps) incommensurable harms precisely because of a willingness to put these harms into the

43. *See, e.g.,* Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

44. *See* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985) (showing that placing a dollar value on the life of a child was once considered a moral advance compared to the practice of allowing only adults to recover tort damages, or compared to the practice of making life insurance unavailable for the lives of children) (I am grateful to Martha Minow for directing me to this fascinating study); *see also* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990) (describing the history of allowing mothers to recover tort damages for the shock or fright incurred upon witnessing injuries to their children).

45. I believe it worthwhile to question the universality of a perspective insistently troubled by the tendency of commensurability perspectives to underappreciate the diversity of value and the diversity of human experience. *See, e.g.,* MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE (1990); 2 CHARLES TAYLOR, PHILOSOPHICAL PAPERS 230 (1985); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990). It is indeed a bad thing to underappreciate the diversity of human experience, but it is also a bad thing to draw distinctions where none ought to exist (there are good reasons for not castigating the Thomas Jefferson of ". . . all Men Are Created Equal" as a reductionist). Thus, it might be that at times a focus on the commensurability of value will be a way of driving unfortunate distinctions out of public discourse and out of public understanding.

same monetary (and conceptual, which is why we call them constitutional *torts*) hopper as we put more traditionally recognized harms.[46]

Nothing in the foregoing presupposes that money must be the unit of measurement. Consider Cass Sunstein's argument against commensurability, an argument in which he places great weight on examples like the following, originally developed by Raz in *The Morality of Freedom*:

> [I]f an employer tells you that, as an employee performing a certain job, you must spend a month away from your home and family, you might well agree. But if someone tells you that he will pay you a monthly salary *in order* to persuade you to spend a month away from home and family, you will probably feel insulted and degraded, and you may well turn him down.[47]

I wonder. If we look at this example against a background of employers being excessively willing to attempt to cajole (or coerce) employees of profit-making companies to make personal sacrifices without compensation for the "good of the company," then the example looks quite different. Offering compensation against a history or social practice of overcoercion and undercompensation could then be seen as a way of telling the employee that the employer considers her time and sacrifice to be just as valuable as the company's bottom line. Moreover, the offer is, perhaps, a way of giving the employee a choice she might not otherwise perceived herself as having had. Note that in the example the offer of money is considered bad by Sunstein and Raz in part because it increases the possibility of refusal. But perhaps that is what makes the offer of money good. If not offering money increases the possibility of the employer getting what *he* wants, and getting it for nothing, then it is difficult to understand why that state of affairs is necessarily to be desired.

Or consider another of Sunstein's examples, one in which he suggests that asking an adult neighbor to mow one's lawn for money

> will often [be regarded] as an insult, because it reflects an inappropriate valuation of the neighbor. The request embodies an improper conception of what the relationship is, or of the attitude with

46. Thus, it may be that by treating certain values as incommensurable we undercompensate those who bear the costs of public acceptance of those (or other) values. *See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992) [hereinafter Schauer, *Uncoupling Free Speech*]. Were we to see free speech and reputation, or free speech and privacy, as commensurable, we might be more willing to compensate (in some way, but not necessarily a monetary way) those whose reputations or privacy are sacrificed to society's free speech or free press interests, just as we compensate people with money through the takings clause when, for public purposes, we take away something (land) ordinarily thought of as commensurable with, and thus more plausibly compensable by, money.

47. Sunstein, *supra* note 11, at 786 (emphasis in original).

> which neighbors render services for each other. The impropriety remains even if the offeree ordinarily would regard the offered wage as a fair price for an hour of mowing services.[48]

Again, the example is problematic, in part because it likewise seems to ignore the possibility that the baseline against which it operates might be one of undercompensation, or one in which there could be a moral case for treating different things similarly.[49] Put aside as a red herring the possibility that *everything* can or should be valued in money. With this aside, consider the difference between the case in which I simply ask my neighbor to mow my lawn because I am unexpectedly away from home longer than anticipated and the case in which, having asked (and received) this favor of my neighbor, I then, upon my return, make it my business to "repay the favor" by finding out what my neighbor considers a particularly odious task and voluntarily performing it for her, or perhaps by doing, over time, roughly as many favors, at my inconvenience, for my neighbor as she does for me. Now if I am overly precise, perhaps this tit-for-tat view will excessively quantify the relationship and will be as infuriating as is the behavior of someone who insists on splitting a large dinner check down to the last penny, including taking into account the fact that one of us ordered a slightly less expensive dessert. But putting this annoying precision aside, it is quite possible that recognizing the commensurability of my effort and my neighbor's effort, or my inconvenience and hers, will over time be a recognition of greater respect rather than of less. Thus, although it is often the case that a belief in commensurability will produce an insufficient or inappropriate mode of valuation, examples like these suggest that often a belief in incommensurability will produce undervaluation, and that a belief in commensurability, both in per-

48. *Id.* at 787.

49. I think this is a large point. That is, I think that the debate about commensurability is, at least in part, an instantiation of a larger debate about the morality of categorization. The flavor of most modern anticommensurability writing is the flavor of a penchant for the particular, and of an aversion to the ways in which categories necessarily flatten the diversity of human experience and the diversity of human difference. Although no one denies the importance or necessity of categories that inevitably collapse differences among their members, there is still a recognizable difference between perspectives that focus on the importance of particularization (and here I am thinking of important strands of feminist theory, among others) and perspectives that either resist or seek to contextualize arguments about the virtues of particularization. In a world of plural low-level values, commensurability perspectives that gather these diverse low-level values into encompassing and flattening categories operate analogously to the ways in which categories of all types flatten the differences among their members, and rules flatten the potential differences among more context-specific and particular decisions.

sonal life and in constitutional law, may be in some contexts more of a cure than a disease.

IV

I do not intend for the foregoing discussion to be definitive. Rather, I only suggest the kinds of concerns we might explore with respect to commensurability in numerous contexts, including interpersonal dealings, constitutional questions often discussed under the "balancing" rubric, and a host of issues commonly thought of in the context of debates about the use and misuse, the morality or immorality, of cost-benefit analysis.[50] But I do not offer any more than this sketchy discussion because it is not my goal to try to resolve any of these disputes, but rather to focus on the methodology by which we think about them.

The key feature of the foregoing discussion, therefore, is not the correctness or incorrectness of any of my suggestions about commensurability, but rather the suggestion that a view about commensurability might be selected on a basis other than the inherent or intrinsic moral correctness of one view or another. Rather, it is implicit in the foregoing discussion that a view about commensurability should for some purposes be selected in a frankly empirical and instrumental manner for the tendency of the view to advance those moral positions that are, unlike a position about commensurability, morally primary rather than morally instrumental.[51]

The locus classicus of this approach is John Stuart Mill's discussion of "justice" in Chapter 5 of *Utilitarianism*, a chapter entitled "On the Connexion Between Justice and Utility."[52] Although I do not

50. The discussion of (and critique of) cost-benefit analysis most attentive to connecting the legal issues about cost-benefit analysis with the philosophical questions about commensurability is Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991).

51. On the empirical and instrumental component of the debates about legal commensurability, see Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 80-86 (1993). My view is also consistent with the suggestion in Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1545-49 (1992) (book review), but Pildes relies in part on a Pragmatist conception of value I believe is extraneous to the instrumental point I wish to develop, and also describes the effect of a belief in commensurability (and incommensurability) in sufficiently acontextual or universal terms as to be unfaithful to his own Pragmatist and my instrumentalist inclinations on this issue. As I shall explain below, believing that the issue is more instrumental than ontological (although it could be both) entails a strong commitment to taking seriously *both* sides of the commensurability debate.

52. Mill, *Utilitarianism*, *supra* note 5, at 226.

want to engage in Millian exegesis here, and therefore make no claims to offer the "best" or most "authentic" interpretation of Mill's thought, one plausible reading of this Chapter is that Mill does not believe that the traditional requirements or maxims of justice, insofar as they diverge from the mandate to maximize utility, are intrinsically correct, and certainly not superior or even co-equal to the principle of utility. But then he goes on to say that it is nevertheless possible that

> justice is a name for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice.[53]

Because the positive effect of the maxims of justice on social utility is thus collective and not individual, Mill argues that the maxims of justice should be "guarded by a sentiment"[54] (and accompanying sanctions) designed to entrench these generally useful maxims, which will in turn promote the aggregate maximization of utility.

Subsequent writers have elaborated on Mill's ideas in offering the utilitarian case for utilitarian *dispositions*,[55] but my point here is not about or restricted to utilitarianism. Rather it is about the instrumental relation of some principles to others within *any* philosophical framework. For my purposes, the importance of Mill's discussion of justice is in pointing out that the positions that others perceive to be morally primary may still be important instrumentally even if we reject their moral primacy.[56] But this point is hardly exclusive to utilitarianism among the range of cognitivist (that is, nonrelativist and

53. *Id.* at 248.

54. *Id.*

55. *See, e.g.*, Robert M. Adams, *Motive Utilitarianism*, 73 J. PHIL. 467 (1976); Philip Pettit & Geoffrey Brennan, *Restrictive Consequentialism*, 64 AUST. J. PHIL. 438 (1986). There is a difference between developing a disposition because having that disposition will generally increase utility (like having the disposition not to like television, even though having that disposition will sometimes keep one from watching utility-enhancing television shows) and following some rule or mid-level principle because following it will increase utility. Still, the basic point of the two strategies is similar. *See* Michael D. Bayles, *Mid-Level Principles and Justification*, *in* JUSTIFICATION: NOMOS XXVIII 49 (J. Roland Pennock & John W. Chapman eds., 1986); Margaret Jane Radin, *Mid-Level Principles and Non-Ideal Justification*, *in* JUSTIFICATION: NOMOS XXVIII, *supra*, at 33.

56. To reject their moral primacy is not to reject the importance of engaging in the inquiry that produces the conclusion of a value's moral nonprimacy. Mill was no Pragmatist, and Mill was no noncognitivist. He had a position about the primacy of justice, that justice was not morally primary. My point here is that there can be a useful inquiry about which midlevel ideas (or ideals or dispositions) to promote. This inquiry is different from, but does not supplant (because we must know what it is that instrumental values are to be instrumental *to*), the ontological inquiry about what the primary moral values *are*.

nonsubjectivist) metaethical beliefs. *Any* cognitivist metaethics (including one that took justice to be a moral primary) still has the need for various instrumental props designed to ensure the maximum realization of primary moral values. And that is why it is so important to distinguish *instrumental* perspectives, useful adjuncts to the full range of moral frameworks, from *consequential* theories taking a position on the nature of primary values. Thus it is entirely consistent for Ronald Dworkin as an anticonsequentialist to argue that judicial review is instrumentally important in securing the maximum protection of deontologically founded rights, just because of the unlikelihood that majorities will be as effective in recognizing and enforcing rights against themselves. And just as certain concrete institutions, such as courts, might serve this instrumental function, then so can certain beliefs, attitudes, and dispositions. Guilt, for example, might not be a moral primary, in the sense that in an ideal world people would be expected to do the right thing because it was right and not because they would feel bad if they do not. Still, in a nonideal world guilt has its uses. In a nonideal world people feeling guilty when they do what is wrong might be good just because this ancillary enforcement mechanism ensures a higher degree of compliance with moral norms than might be the case if compliance with those norms rested solely on people's intrinsic desires to do the right thing.

If the instrumental point about courts and other formal institutions applies to ideas and dispositions, and this is my point about guilt and Mill's about justice, then it seems quite possible that the same perspective might usefully be applied to views about commensurability as well. Suppose, similarly to Mill's treatment of justice, we have moral beliefs that reject, as a matter of moral ontology, the idea of incommensurability. Suppose, therefore, we do not believe that any version of utility, or anything else, can provide the common metric for comparisons of value and that certain values are intrinsically, at bedrock, incommensurable. Incommensurability is just part of the moral furniture of the world. In short, we believe arguments for incommensurability to be correct as a matter of moral ontology.

Yet, even if we (and the "we" gets tricky here, for reasons I will explore) hold these ontological beliefs, we might nevertheless conclude that a widespread public or official *belief* in incommensurability would have negative moral consequences. Suppose, for example, that a public belief in incommensurability produced for many people the associated belief that there was no point in engaging in extensive anguish trying to weigh incommensurable values against each other.

In other words, suppose, not implausibly, that a belief in incommensurability produced in many people the associated belief that moral deliberation was quite often futile and that it would be best to go with one's first instincts rather than trying to work out the unworkable. Suppose, as well, that a belief in commensurability, a belief that there was an answer there if only we would take the trouble to struggle for it, led people towards the path of more, rather than less, effort in their attempts to work out the answers to moral problems. If this were the case, then even if incommensurability might be correct as a matter of ideal moral theory, adopting or inculcating a belief in commensurability might still produce better results in a nonideal world, just as for Mill the inculcation or adoption of a belief in the maxims of justice would produce the best results, even though it was utility and not the maxims of justice that best represented the morally correct position.[57]

This conclusion applies in more concrete contexts as well. Suppose that a widely held belief in incommensurability produced an atmosphere of pervasive undercompensation for harms to others. Suppose that a belief in incommensurability produced, for example, an unwillingness to compensate people for injuries just because the best (or at least the most common) form of compensation we now have, money, is inadequate. Then suppose someone visits my house and accidentally damages an irreplaceable work of art for which I have great personal and aesthetic affection. If the visitor immediately took out her checkbook and said, "How much?", I would resent her underappreciation of the irreplaceability of the item she had broken. But if she apologized profusely without an offer of compensation (which in most circumstances I would reject), I might equally resent the ease with which she had moved from the fact of irreplaceability to the lack of any obligation on her part to try, however ineffectively, to replace the irreplaceable. Thus, even though the loss I suffer might be genuinely incommensurable, a compensatory approximation might still be morally better than nothing at all. Additionally, fostering a public belief in commensurability (as in fostering the belief that all harms can and should be compensated with money), despite the ontological correctness of incommensurability, might also produce in the

57. I recall a similar point being made in conversation by Isaac Levi, who in the context of analogous debates about whether moral dilemmas exist (*see, e.g.*, WALTER SINNOTT-ARMSTRONG, MORAL DILEMMAS (1988); Earl Conee, *Against Moral Dilemmas*, 91 PHIL. REV. 87 (1982)) argued that we might wish to believe that moral dilemmas do not exist (even if they do), because believing in the nonexistence of moral dilemmas will prevent people from throwing up their hands in despair prematurely, and prevent them from making arbitrary decisions when better decisions might be available.

aggregate better (measured against our moral primaries, of which incommensurability would be only a small part) results.

A belief in commensurability may also produce better results when the law *correctly* takes away something for which nothing is commensurate. If my property is justifiably taken for public use, a widespread belief in commensurability might produce more compensation, and thus more recognition of my sacrifice, than would have otherwise been the case. Similarly, when reputations are harmed for the public good, or when people are treated unequally for the public good, or when privacy is invaded for the public good, a belief in the commensurability, rather than in the incommensurability, of these harms might produce a morally desirable attempt at some sort of compensation.[58]

At times the situation might, of course, be just the opposite. The ease of compensation, as in the case of the person at my house who reaches for her checkbook instead of apologizing, or the state whose ability to award just compensation may lead it too easily to assume that it can buy off people's memories or experiences or life plans, may in a nonideal world produce morally suboptimal results. If this is the case, then it might be advisable to adopt and to inculcate a belief in incommensurability, and to do so even if commensurability is correct as a matter of ideal theory. Thus, to run the previous argument in the opposite direction, we might believe, were we good consequentialists, that commensurability was correct, but that a belief in commensurability led to a widespread but erroneous assumption that money was the appropriate unit of commensuration. Or it might be the case that a belief in commensurability led to undervaluation in practice, such that a belief in incommensurability prevented the kind of undervaluation that seems to be at the heart of many objections to commensurability.

Were this the case, then it might be consequentially desirable to adopt or to inculcate incommensurability as a disposition even if incommensurability was incorrect as a disposition-independent moral primary, just as for Mill the desire to adopt or to inculcate the disposition of justice was consequentially desirable even though justice was not a disposition-independent moral primary. From this perspective, the debate about commensurability might usefully be redirected into a more empirical one about the tendencies of certain dispositions and

58. Schauer, *Uncoupling Free Speech*, *supra* note 46.

away from one about the intrinsic correctness of one view or another about commensurability.[59]

One possible rejoinder would be to wonder if anything turns on this argument. That is, if, as Mill maintains, believing in justice produces maximum utility, then why is the state of affairs in which people believe in justice instrumentally any different, except as irrelevant abstract speculation, from a state of affairs in which people believe in justice *simpliciter*, or a state of affairs in which justice as a moral primary is simply true? The response to this, however, is that by recognizing that at least some beliefs or dispositions are justified by their empirical tendencies rather than by their intrinsic correctness, we recognize that these empirical tendencies might go in different directions at different times, in different places, and in different contexts. Whether this is true or not with respect to justice and utility, it seems more likely true with respect to views about incommensurability. At certain times and in certain places the problems may be ones of undercompensation and undervaluation and excess attention to potentially illegitimate differences among people and values, and at other times and in other places the problems may be ones of excess willingness to trade lives against money, or excess unwillingness to recognize

59. Throughout this discussion I put aside what would be difficult questions from some nonconsequentialist and some consequentialist perspectives. These questions concern transparency, or, to put it more bluntly, honesty. The questions do not arise when, with full knowledge, we are training ourselves to have certain dispositions that we know we would not want to have were conditions ideal. They do arise, however, when those with the power to promote certain ideas, ideals, dispositions, and attitudes do so from a sense (which obviously they believe, even if erroneously) that it is important for the masses to have attitudes that they themselves do not see the need to have. This perspective, described by Bernard Williams as "Government House Utilitarianism," BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 108-10 (1985), and castigated by many since then, Hare, *Comments*, *in* HARE AND HIS CRITICS: ESSAYS ON MORAL THINKING 199 (D. Seanor & N. Fotion eds., 1988); Scanlon, *Levels of Moral Thinking*, *in* HARE AND HIS CRITICS: ESSAYS ON MORAL THINKING, *supra*, at 129; and Williams, *The Structure of Hare's Theory*, *in* HARE AND HIS CRITICS: ESSAYS ON MORAL THINKING, *supra*, at 185, is not to me as undeniably reprehensible as many think, because it may be morally obligatory to take actions to prevent the moral mistakes of others. To put it differently, respect for the moral autonomy of others is only one among many values. Thus respect may at times yield to a moral imperative to disrespect another's moral autonomy and prevent her from making moral mistakes. For a beginning of an account of when and why this might be so, see Frederick Schauer, *The Asymmetry of Authority*, *in* PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 128-34 (1991). But recognizing that there is much more to be said about this question, I will do no more here than simply acknowledge it as a difficulty. I do so perhaps more for the typical nonconsequentialist thinking about whether to promote a belief in the commensurability of values than for the typical consequentialist trying to promote, in the fashion of Mill, a belief in the incommensurability of values.

the diversity of human experiences. Only by treating the instrumental inquiry as different from the primary one do we keep open the possibility that instrumental values are context-sensitive in a way that noninstrumental ones are not.

The foregoing makes clear that the position I describe as "instrumental" is not the same as the cluster of positions commonly described as "pragmatist." The real pragmatist, or perhaps I should say "Pragmatist" with a capital "P," would object to my characterization of instrumental views about commensurability as "midlevel," for to the true Pragmatist there is no higher level that this midlevel is below. My view is therefore more modest. Although what I say might be compatible with Pragmatism, it is also compatible with anti-Pragmatist views having a more firmly objectivist or cognitivist view about the nonreducible moral primacy of things like, for example, utility, or equal concern and respect. My point is that even such anti-Pragmatists, regardless of whether they are consequentialist anti-Pragmatists or nonconsequentialist anti-Pragmatists, would have use for instrumental midlevel principles or ideas selected on the basis of the tendency of a principle or idea best to promote the primary values, whatever those primary values happen to be under some particular metaethical position.

V

In trying to deflate some of the moral rhetoric surrounding the commensurability debate in legal and constitutional context, I take on a portion of what turns out to be a somewhat larger agenda. With some frequency, positions that I would argue are midlevel and instrumental are commonly treated as morally primary. Consider the traditional arguments about judicial review. These arguments are all too often conducted in the language of political legitimacy, moral legitimacy, and the atemporal and largely acontextual desirability (or undesirability) of one or another view about judicial review, and about the methods of constitutional interpretation.

But suppose we think of the question of judicial review, like the question of commensurability, instrumentally. That is, suppose we think of judicial review generally, and methods of constitutional interpretation by the courts specifically, simply as devices of institutional design, mechanisms for securing more primary values. Were that the case, we would see a marked decrease in *theories* of judicial review or judicial legitimacy, or *theories* of constitutional interpretation, because there is something about a *theory*, unlike a strategy, or a tactic, or a

device, that suggests deep-seated moral or political foundations, not changeable by a simple change in personnel or political winds. But it is hardly clear that judicial review, or the importance of attending to or ignoring the intentions of the drafters, is morally primary in the way in which equality or autonomy or utility might be morally primary.[60] So if accounts (not theories) of judicial review are not primary, then the best test of such an account, including a normative account, would be a test that measured that account's tendency to advance something that *is* morally or politically primary.

Midlevel and instrumental devices for the furtherance of primary values need not be structures such as courts or institutions like judicial review. They can be ideas, ideals, conceptions, and attitudes, such as Mill's view of justice, and my view of commensurability. But when we deflate the moral rhetoric and think of some ideas and institutions instrumentally, the way we think about these ideas and institutions changes as well. First of all, questions that might otherwise have been nonempirical become empirical. For example, whether a belief in justice will maximize utility, or a belief in incommensurability will increase the solicitude for individual rights, are essentially empirical issues, investigatable by empirical methods. One of these methods, but hardly the only one, is, like Mill's empirical speculations about the effect of a belief in justice on utility, individual observation of the world and generalization from those individual observations. But there are others as well, and it may be important to keep in mind the testability in theory (and sometimes in practice) of empirical speculation about the effect of belief in some idea *on* some set of practices.

Insofar as the issues are empirical, they are also changeable. When we adopt an idea, or a theory, based on a certain empirical state of the world, we remain open to the possibility that under different empirical conditions we might want to promote different and even contrary ideas, or internalize different and even contrary dispositions, or adopt different and even contrary theoretical frameworks. Thus, what Jack Balkin has referred to as "theoretical opportunism"[61] might

60. I acknowledge but bracket here the issue whether democracy is a moral primary, or is instead just a decision-making device. The more we think of democracy (or, for the finicky, majority rule) as itself being a moral primary, the less a discourse about judicial legitimacy will be susceptible to this instrumental account.

61. J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 880 (1993). This is a commentary on Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993) (The Day, Berry, and Howard Lecture), and what I say here is partly in response to Balkin, although there may be little difference between us. I believe we agree that all of law as we know it is itself instrumental, that neither law nor its good-

no longer bear the stigma that even Balkin's (in fact sympathetic) use of the word "opportunism" suggests. Consider the lawyer who argues in one case that the best evidence rule admits a given item of non-documentary evidence, and a week later in a different case argues that the best evidence rule precludes use of substantially the same type of evidence. Implicit in withholding moral condemnation on the grounds of inconsistency is the view that in this context the interests of the client are primary, and the use of some legal position or another in the service of the primary interest is to be evaluated only instrumentally.

The question, then, and I mean to put it as a question and no more, is one of determining the point at which instrumental selection on empirical grounds runs into dishonest inconsistency. Part of the answer to this question would be less about moral theory than about speech act theory, in the sense that it would be an account of what kinds of representations we make when we make assertions about the law. If the pragmatics (small "p"—in opposition to semantics, and nothing to do with Pragmatism) of legal assertion is such that the lawyer who makes claims about the state of the law with respect to the best evidence rule is not taken to have made claims about what she thinks the law is, or about what she thinks the law ought to be, then she is doing nothing dishonest in making a nonfrivolous argument for L at one time and a nonfrivolous argument for not-L at another. But the pragmatics of other contexts of legal or moral assertion might be different, and thus there might be a difference between, on the one hand, arguing in court that the best evidence rule keeps out an item of evidence while believing the best evidence rule to be a bad idea, and on the other hand, arguing publicly that judicial review is valuable or that values are commensurable while believing judicial review to be a bad idea and that values are incommensurable.

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ness is morally primary, and that there is nothing about the category or concept of law that cannot and should not be evaluated instrumentally. Indeed, there may be no concept of law at all. I develop this idea further in a series of forthcoming articles. Frederick Schauer, *Positivism as Pariah*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (Robert George ed., forthcoming 1994); Frederick Schauer, *Fuller's Internal Point of View*, 14 L. & PHIL. (forthcoming 1994); Frederick Schauer, *Norms and Normativity: A Defense of Simple Positivism*, CAN. J. PHIL. (forthcoming 1994). At times, however, Balkin takes what he calls "ideological drift," and what I would call the strategic use of values, one step further than I would, as when he says things like "There is no group of persons whose judgments of political morality escape the play of drift," Balkin, *supra* at 883, or "normative argument is a boat in which we are all in together, and that boat is always drifting." *Id.* For my part I want to deny the existence of normative drift on the primary level (and I suppose that is what it is to be a moral cognitivist), while admitting and welcoming it on lower instrumental levels.

Even when we sort out the pragmatics, however, we are left with difficult moral questions about the circumstances under which "we" would try to foster certain beliefs that "we" did not believe because "we" believed that those beliefs, in the hands of "them," would produce the morally best world.[62]

Perhaps the answer is "never." But even if the answer is "never," and *a fortiori* if it is not, there remain serious questions about the kinds of attitudes, ideas, ideals, and dispositions we ought to decide that all of us should have. This question may turn out to be more often instrumental than we think, and the question of whether we should accept, in this place and at this time, the idea of commensurability, as opposed to the question whether commensurability, at any place and at any time, is correct, is as good a place as any to start.

62. This is a central question in R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT (1981), although Hare's distinction between "archangels" and "proles," *id.* at 44, can hardly have been calculated to generate maximum sympathy for his enterprise.